

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

S.L., a minor, by and through : CIVIL ACTION  
his parents and next friends, :  
P.L. and V.L. :  
 :  
v. :  
 :  
FRIENDS CENTRAL SCHOOL, et al. : NO. 00-472

MEMORANDUM

Dalzell, J.

April 5, 2000

This action is based on a cyberspace conversation between two high school students that resulted in one's expulsion. Currently before us is plaintiffs' motion asking us to reconsider our Order granting as unopposed the motion to dismiss of defendant Friends Central School. For the reasons that follow, we will grant the motion for reconsideration but will affirm on the merits our decision to dismiss plaintiffs' complaint as to Friends Central.

I. Plaintiffs' Motion for Reconsideration

On March 9, 2000, we granted as unopposed Friends Central's motion to dismiss plaintiffs' amended complaint because plaintiffs had failed to file a response to it.<sup>1</sup> Shortly after issuing our Order, however, we received plaintiffs' untimely response. Plaintiffs now ask us to reconsider that Order, arguing (incorrectly) that their response was "timely filed

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<sup>1</sup> Under Local R. Civ. P. 7.1(c), "in the absence of a timely response, [a] motion may be granted as uncontested."

pursuant to the date which Defendants' Motion was received by Plaintiffs' counsel," Pls.' Mot. ¶ 6.

Friends Central filed its motion on February 17, 2000 and served it via first-class mail on plaintiffs' counsel that same day. Pursuant to Local R. Civ. P. 7.1(c) ("[A]ny party opposing [a] motion shall serve a brief in opposition . . . within fourteen (14) days after service of the motion"), Fed. R. Civ. P. 6(e) ("Whenever a party . . . is required to do some act . . . within a prescribed period after the service of . . . a paper . . . , and the . . . paper is served . . . by mail, 3 days shall be added to the prescribed period."), and Fed. R. Civ. P. 5(b) ("Service by mail is complete upon mailing."), plaintiffs' response was due on March 6, 2000, and the March 9 filing therefore was untimely.

While we are reluctant to countenance plaintiffs' disregard of both the Local and Federal Rules of Civil Procedure, we nevertheless will grant their motion for reconsideration, since it appears that our Order and their response crossed in the fax machine, and we will move on to a consideration of Friends Central's motion on the merits.

## II. Friends Central's Motion to Dismiss

In their amended complaint, plaintiffs assert claims under federal and state wiretap statutes and the Americans with Disabilities Act ("ADA") against Friends Central.<sup>2</sup>

According to the complaint, plaintiff S.L. was an eleventh-grade student at Friends Central during part of the 1999-2000 school year. On the afternoon of November 27, 1999, he participated in an America Online ("AOL") Instant Messenger<sup>3</sup> conversation with another Friends Central student, "John Doe".<sup>4</sup> See Am. Compl. ¶ 9. Doe saved the text of the conversation using the "cut-and-paste" feature on his computer and brought a transcript of it with him on a school trip to La Jolla, California several weeks later. See id. ¶¶ 12-13. A chaperone on the trip allegedly "seized" the transcript and, upon return to Pennsylvania, disclosed its contents to Friends Central administrators. Friends Central suspended S.L. from school on

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<sup>2</sup> They also assert claims under 42 U.S.C. § 1983 and the Pennsylvania School Code against defendants Upper Darby School District and its Board of Directors.

<sup>3</sup> The complaint says that American Online defines its "instant message" service as "an on-line conversation between two or more people who have AOL Instant Messenger or America Online software. Instant messages are private and free." Am. Compl. ¶ 10.

<sup>4</sup> At the time of the conversation, both students were in their respective homes using their own personal computers and Internet access.

December 13, 1999 based on the transcript's contents.<sup>5</sup> See id. ¶ 13.

While S.L. was on suspension, school administrators advised his parents to obtain psychiatric and psychological evaluations of him to determine if he "posed a threat to the Friends Central community." Id. ¶ 14. Before the results of the evaluations became available, however, Friends Central expelled S.L. S.L., along with his parents, thereafter filed this action.<sup>6</sup>

Friends Central has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).<sup>7</sup> It first argues that we should dismiss the claim under the federal wiretap statute, 18 U.S.C. § 2510 et seq., because plaintiffs have failed to allege facts sufficient to support such a claim.

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<sup>5</sup> The amended complaint alleges that, while he was on suspension, S.L. heard from other students that "rumors were circulating among students and faculty that the . . . conversation [contained] anti-Semitic and racist remarks." Id. ¶ 15. Plaintiffs deny that the conversation included such comments, and, for the record, it did not.

<sup>6</sup> S.L. is currently enrolled at the Upper Darby High School, a co-defendant in this matter.

<sup>7</sup> When considering a motion to dismiss, we are required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and to view them in the light most favorable to the non-moving party. See, e.g., Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). We may dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

18 U.S.C. § 2511(1) provides, in relevant part, that any person who

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be subject to [civil liability]. See 18 U.S.C. § 2511(1) (West Supp. 1999) (emphasis added).

In order for Friends Central to be liable under these provisions of the federal wiretap statute, a third party must have illegally intercepted the conversation at issue. See 28 U.S.C. § 2511(1)(c) and (d) (prohibiting the disclosure or use of the contents of an electronic communication obtained "through . . . interception . . . in violation of this subsection."). However, plaintiffs do not allege any facts that would suggest there was anything at all illegal about Doe's act of saving the conversation.

The complaint alleges that Doe, a party to the conversation, "captured and recorded the text of the . . . conversation by using the cut-and-past feature on his computer." Am. Compl. ¶ 12. He then brought the transcript on a school

trip, where a chaperone "seized" it and disclosed its contents to Friends Central administrators. See id. ¶ 13. 18 U.S.C. § 2511(2)(d) provides that it

shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication, . . . unless such communication is intercepted for the purpose of committing any criminal or tortious act".<sup>8</sup>

Taking all of the allegations in the complaint as true and drawing all reasonable inferences from them, Doe did not violate the federal wiretap law when he recorded the AOL conversation. Thus, because there has been no unlawful interception -- i.e., because no information was obtained "in violation of" the federal wiretap statute -- plaintiffs' claim against Friends Central must fail. See Goode v. Goode, 2000 WL 291541, at \*3 (D. Del. Mar. 14, 2000) ("Sections 2511(c) & (d) provide that it is unlawful for a person to use or disclose wiretap information obtained 'in violation of this subchapter' . . . because [the interceptor's] activities were lawful, [the use

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<sup>8</sup> There is no allegation that Doe saved the conversation with tortious or criminal intent, nor any allegation that his acts were "unlawful."

by a third party] also was lawful").<sup>9</sup> We therefore will dismiss the first count of the amended complaint.

Friends Central also has moved to dismiss plaintiffs' claims under the ADA and the Pennsylvania wiretap statute. Plaintiffs do not address these arguments in their brief, so we will grant Friends's motion to dismiss them as unopposed.<sup>10</sup>

An Order follows.

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<sup>9</sup> Also, our Court of Appeals held in Bartnicki v. Vopper, 200 F.3d 109, 129 (3d Cir. 1999), that the wiretapping act "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." Thus, even if we were to conclude that Doe's interception was unlawful, plaintiffs do not allege that Friends had anything at all to do with that interception.

<sup>10</sup> In any event, it is obvious from our discussion of plaintiffs' federal wiretap claim that they cannot make out a claim under the Pennsylvania statute. See Angnew v. Dupler, 717 A.2d 519, 522 (Pa. 1998) ("A claimant must demonstrate . . . that the defendant attempted to, or successfully intercepted the communication, or encouraged another to do so."). There are no allegations in the complaint to satisfy this requirement.

ORDER

AND NOW, this 5<sup>th</sup> day of April, 2000, upon consideration of plaintiffs' motions to vacate and for reconsideration (Docket Entry Nos. 14 and 15), and the response thereto by Friends Central School, and Friends Central's motion to dismiss the amended complaint and plaintiffs' response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Plaintiffs' motion for reconsideration is GRANTED;
2. Defendant Friends Central School's motion to dismiss is GRANTED; and
3. Friends Central School is DISMISSED from this action.

BY THE COURT:

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Stewart Dalzell, J.